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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 696

THILLENS, INC., A CORPORATION,
Appellant,

vs.

LLOYD MOREY, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS; LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS; JOHN GUTKNECHT, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS, *Appellees*, and

HAROLD A. ARNOLD, DOING BUSINESS AS LAKEVIEW CURRENCY EXCHANGE; RALPH BARR AND LOUIS WOLFBERG, COPARTNERS DOING BUSINESS AS MARSHALL SQUARE CURRENCY EXCHANGE; JOHN F. BOGIE, DOING BUSINESS AS RAVENSWOOD CURRENCY EXCHANGE; AND SIDNEY SORKIN, DOING BUSINESS AS CERTIFIED CURRENCY EXCHANGE,
Appellees.

Appeal from the Supreme Court of Illinois.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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"The legislature is without authority to act as a handicapper in the race for commercial success, as it here has done."

• • • • •

"It is naive to regard this amendment as anything more than an ill-considered legislative attempt to place a millstone of regulation around the neck of a legitimate business, under the guise of the exercise of the police power."

(Opinion of the dissenting justices, *Thillens* v. *Morey*, 11 Ill. 2d 579, 598, 599, Jurisdictional Statement, Page 38a.)

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Appeal from the Supreme Court of Illinois.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

This suit is based on the premise that the Fourteenth Amendment to the Federal Constitution requires that courts be as zealous to protect the property rights of citizens, including the right to engage in a lawful business enterprise, as to protect their other civil rights.

The matter here before this Court is a suit for a declaratory judgment that the Community Currency Exchange Act of 1943, as amended in 1951, be declared invalid and unconstitutional and therefore unenforceable as applied to plaintiff's check cashing business.

This case involves the same statute reviewed by this Court in *Morey* v. *Doud*, 354 U. S. 457. Probable jurisdiction should be noted herein, because a full briefing and argument of this case would show a singular example of statutory discrimination of the type condemned by this Court in that case.

The case focuses attention on one of the growing problems of our age: the power of a group of businessmen and a responsive legislature to destroy or seriously injure the business of one citizen for the sole purpose of aiding his competitors. Legislation of this character may well be a more serious danger to free competition and the valuable property rights of citizens, than the more traditional methods of unfair competition.

The amended act here questioned is a particularly invidious and deceptive example of unfair competition by legislation. The intervening defendant community currency exchange operators engage in two principal types of operation: (a) the sale of money orders, and (b) the cashing of checks. The act was conceived to restrain plaintiff's check-cashing competition. Its provisions have not the remotest relation to any other hazard than the allegedly "ruinous competition" which the currency exchange operators think that Thillens poses to them. The result of enforcement of the act would be serious injury to, or destruction of, his valuable business.

I. THAT THE OBJECT OF THE LEGISLATION HERE UNDER REVIEW IS DISCRIMINATION AGAINST THE BUSINESS OF THE PLAINTIFF IS BOLDLY STATED IN THE PREAMBLE OF THE ACT.

Concerning the "community" [stationary] currency exchange operators, the act "finds":

> "that it is in the public interest to *promote* and *foster* the community currency exchange business and *to assure the financial stability thereof.*" (Italics ours.)
>
> "that the number of currency exchanges should be limited in accordance with the needs of the community they are to serve, and in accordance with the provisions of this act." (Jurisdictional Statement, Page 43a.)

The statutory direction that the number of stationary exchanges in each community be limited in accordance with the needs of the community (Sec. 4.1) and that the financial stability of each exchange be assured has been interpreted by the Supreme Court of Illinois as permitting the State Auditor to set up a system of territory allocation, under which established exchanges in each community are extended an umbrella of monopolistic protection against new entrants, *Gadlin* v. *Auditor of Public Accounts*, 414 Ill. 89.

In contradistinction, however, plaintiff's business (for which the term "ambulatory currency exchange" was invented), is not to be "promoted" and "fostered" and "assured financial stability". It is declared to be a public hazard, and ruinous and unfair competition to the community currency exchanges. The Act "finds":

> "that the nature of the ambulatory currency exchange business is such as to render it hazardous and dangerous to the public safety and security;" (Jurisdictional Statement, Page 43a).

The public hazard is specified in the following paragraph:

> "that the operations of the ambulatory currency exchange business have enabled it to appropriate the most profitable function of the community currency exchange business without incurring the expenses of, or subjecting itself to the regulations imposed upon the community currency exchange business, and to secure thereby an unfair advantage; that there has resulted therefrom an unfair and ruinous competition to the licensed community currency exchange business;" (Jurisdictional Statement, Page 43a).

II. THAT THE PURPOSE OF THIS LEGISLATION IS AND THE RESULT OF ITS ENFORCEMENT WILL BE INJURY TO PLAINTIFF'S VALUABLE PROPERTY RIGHTS HAS BEEN RECOGNIZED BY THE TRIAL COURT, BY THE DISSENTING JUSTICES IN THE SUPREME COURT OF ILLINOIS, AND BY THE GOVERNOR OF ILLINOIS ON BOTH OCCASIONS WHEN THIS BILL WAS PRESENTED TO HIM FOR HIS SIGNATURE.

In their opinion, which should be read in its entirety (Jurisdictional Statement, Pages 37a-40a), the dissenting justices stated:

> "A complete reading of the act before us reveals a singular purpose to deprive plaintiff of its present competitive position. The legislative finding and declaration of policy, in the amendment, boldly announces a plan to protect community currency exchanges from competition by ambulatory currency exchanges. But the legislature did not attempt to achieve this purpose by the regulation of fees or charges for the services rendered. Rather, it sought to burden the plaintiff by the imposition of multitudinous license fees, investigation fees, examination fees, surety bonds, armed guard, supervisory and report and record requirements. It is inescapable that these requirements are not designed to protect the public, but to increase plaintiff's cost and facility of doing business. The

legislature is without authority to act as a handicapper in the race for commercial success, as it has here done."

• • • • •

"It is naive to regard this amendment as anything more than an ill-considered legislative attempt to place a millstone of regulation around the neck of a legitimate business, under the guise of the exercise of the police power." (Jurisdictional Statement, Pages 37a, 38a.)

The trial court stated:

"• • • We must conclude that as to the plaintiff's business the Act in question has no proper foundation in the police power of the State, is purely arbitrary and hence, insofar as it affects the plaintiff's business, invalid." (Jurisdictional Statement, p. 20a.)

Governor Stevenson in his 1949 message stated concerning this legislation:

"There seems to be no doubt but that this Bill represents a further step in the efforts of the community currency exchange operators to eliminate or reduce competition from concerns which cash employees pay checks for a charge on the premises of the employer."

"In my opinion the protection of limited business interests from competition without compensating public benefit exceeds the legitimate bounds of governmental regulation. It is argued here that the competitive advantage results from freedom by ambulatory exchanges from licensing and regulatory provisions to which community exchanges are subject. However, it is not proper or constitutional to make these provisions likewise applicable to ambulatory exchanges unless they serve some reasonable public purpose."

"I am advised that the sole business of existing ambulatory exchanges is the cashing of employees' pay checks on the premises of employers. They do not issue money orders, or act as agents in payment of utility bills or render various other services, as do the community exchanges. They merely exchange their own cash for pay checks and no relationship of trust

or confidence is created. Under these circumstances, I am at a loss to see what there is in the transaction that can appropriately be supervised by the Auditor or what public purpose is served by the multiplication of license fees. Likewise, I do not see what obligations to customers are created so as to justify the unusual surety bond requirements. If the theory is that the possession of currency for cashing pay checks creates an invitation to crime so as to justify control, then this Bill is discriminatory since an employer who cashes his own checks is not regulated, and a community exchange, which may also be subject to holdup, is not required to have an armed guard. If such a theory were sound then each person who carried a thick wallet or wore a valuable diamond could be required to employ an armed guard and to undertake to compensate any passerby injured in the event of a holdup."

"For the foregoing reasons, I veto and withhold my approval from House Bill No. 142."

Respectfully,

ADLAI E. STEVENSON,
Governor."

(Jurisdictional Statement, pp. 68, 69a.)

In 1951 the Governor stated as follows:

"Under our system of government, this is a question to be determined in the first instance by the representatives of the people assembled in the legislature, *but it is a determination which is always subject to review by the courts.* So far as the executive is concerned, I have expressed my views once on this particular regulation in my veto message of the bill enacted at the last session. Although there are differences between this bill and the earlier one which make this one somewhat less onerous, *I am still of the opinion that the proposed regulation is motivated more by restraint of competition than by need for regulation.* And, even assuming the need for some regula-

tion to protect the public, I fail to find in this bill a a soundly conceived plan for adapting the manner of regulation to the need." (Italics ours.) (Jurisdictional Statement, p. 71a.)

III. DEFENDANTS' BRIEFS ADMIT THAT THE OBJECT OF THIS ACT IS INJURY TO PLAINTIFF'S BUSINESS.

Perhaps the most revealing page in all of the documents filed herein by defendants is page six of the motion of Mr. Soble and former Justice Thompson on behalf of the intervenors. It shows the real nature of the conflict of interest between the exchange operators and the plaintiff, which resulted in this legislation. It describes the supposed evils which the currency exchange operators intended to remedy by this Act. The matters therein discussed are detailed in this section of the brief.

The original means by which the community currency exchange operators hoped to eliminate plaintiff's lower-priced competition was the "fixed place of business requirement" (Sec. 1). Said operators hoped to eliminate plaintiff's mobile check cashing competition by thus outlawing it entirely. This hope was dashed in *People* v. *Thillens*, 400 Ill. 224, 236, in which it was held that the Currency Exchange Act was not intended to apply to plaintiff's business, and that if it did, it was probably unconstitutional.

The Intervening Currency Exchange operators have not altered their intentions toward plaintiff. As stated at page 6 of Intervenors' motion:

> "Thus, when *People* v. *Thillens* was decided by the Supreme Court, it became clear that the 1943 Act was but a *mirage* for the *distressed community exchanges* which alone were subject to the high costs of regulation, and that it placed in the hands of the armored car services a *sword of tremendous advantage* with which to cut down their competition."

The "sword of tremendous advantage" retained by Thillens was its continued existence.

That Thillens' continued existence is really what the exchange operators are attempting to eliminate is also shown by the following paragraph appearing on page 6 of Intervenors' Brief:

> "Four exchange operators testified that their check cashing activities were almost paralyzed when appellant moved in. One of them reduced his rates to meet appellant's. When he tried to raise his rates back again, he lost out to appellant. (Abst. 607, 610, 430-432, 622, 623, 379-381, 331-336, 347-349; Rec. 1957-1960, 1984, 1582-1589, 2041-2046, 1333-1334, 1046-1069, 1165-1175.)"

The extensive abstract references above show the importance of this point to the operators. Competition was the complaint of intervenor's many witnesses. Having restrained competition amongst themselves by the licensing provision (Sec. 4.1), referred to in section I of this brief, they sought similar protection against competition by Thillens.

And, of sourse, the operators raise the age-old cry of all would-be monopolists: that their competitor, plaintiff, is underpricing them.

> "Freed from regulation, appellant was enabled to *so seriously underprice* the community exchanges, which are prohibited from engaging in business except at a fixed place of business, that while appellant's business grew from nothing in 1934 to a volume of 3,800,000 checks ($235,000,000) in 1951 * * *, the check cashing operations of the community currency exchanges slumped badly * * *" (Italics ours) (Intervenors' Brief, p. 6).

IV. OPERATION OF THE STATUTE WOULD RESULT IN INVIDIOUS DISCRIMINATION AGAINST PLAINTIFF.

Under the 1951 Act Thillens is required (Sec. 2 & 10) to secure a separate and additional license for each of the 1,500 or more locations now served (1958). The 1951 Act did not specify standards to guide the Auditor in granting or revoking licenses but did require that the plaintiff obtain from each employer or duly authorized representative thereof a separate statement that the service is desired (Sec. 4). In the closing days of its 1957 session the legislature amended the Act to add to the above the requirement (Sec. 4.3) of a certificate of convenience and necessity for the issuance of an "ambulatory" license.

> "Upon receipt of an application from an ambulatory currency exchange for the conduct of its business at a location to be served by it, the Auditor of Public Accounts and after June 30, 1958, the Director of Financial Institutions shall investigate the need of the community for the establishment of such business at the location specified in the application. If the issuance of a license to engage in such business at the location specified will not promote the convenience and advantage of the community in which such business is proposed to be conducted, then the application shall be denied; provided, however, that any location regularly served by such ambulatory currency exchange before July 1, 1957, shall be approved by the Auditor of Public Accounts and after June 30, 1958, by the Director of Financial Institutions as to location, if all other requirements set forth in the act, to which this section is added, shall have been complied with by September 30, 1957." (Ill. Rev. Stat. 1957, Chapt. 16½, Par. 34.3.)

The purpose of the September 30th deadline appears to have been to induce plaintiff to abandon this appeal. Leaving aside the question of the effect of this proviso, a reading of these four sections shows that the legislature was

trying to freeze the present scale of plaintiff's operations and to remedy the principal complaint of the currency exchange operators, *i. e.*, competition by plaintiff.

The extensive procedural requirements of the entire act would make it next to impossible to extend, or even retain plaintiff's present scale of operations. Employers offer this service to their employees as a convenience. The question arises, how many employers would be willing to participate in hearings before the Auditor on the nebulous questions of public convenience, and possible court action thereon, in order to secure a service for their employees which the new customers may never have tested. This Court has long recognized that a multiplication of licensing and other procedural requirements may negate a substantive constitutional right. *Hood* v. *Dumond*, 336 U. S. 525; cf. *Staub* v. *Baxley*, No. 48, Oct. Term 1957, U. S. Supreme Court.

Section 4 requires an affidavit by a "duly authorized representative" of each employer. The sole purpose of this provision is harassment. Quaere: Does this not mean authorization by the board of directors, in the case of a corporation? Plaintiff's business depends on continuous uninterrupted service. To make the continuance of plaintiff's business dependent on the future formal action of some 1500 boards of directors is to impose a condition which is not only unreasonably burdensome but has not the remotest relation, to any public hazard.

Now when the Auditor holds these 1,500 license hearings (Sec. 4.3), the question arises as to what test he must use in granting or denying the license. Presumably the test would be the same as that used under section 4.1 of the Act. That is, if a community exchange could show that the plant seeking the service was located within his territory, apparently the application would have to be denied. The history of this legislation, the decision of the Supreme Court of Illinois in *Gadlin* v. *Auditor*, 414 Ill. 89 (com-

mented upon *supra* at page 3 and the statement in the preamble, that "community currency exchanges" (but not "ambulatory currency exchanges," *i. e.*, Thillens) are to be "promoted," "fostered," and "assured financial stability" would seem to require this result. (See also the testimony and exhibits of Max Pyka, the assistant to the then Auditor Hodge, Abst. 489-600, 611-617, showing the territorial allocation system employed by the Auditor in processing licenses.)

In an attempt to cause plaintiff to raise its rates and so to be priced out of competition, defendants have sought to load plaintiff with a plethora of license fees, investigation fees and examination fees. As Justice Davis stated: "It is inescapable that these requirements are not designed to protect the public, but to increase plaintiff's cost and facility of doing business." (Jurisdictional Statement, Page 37a). The total fee charges of all community exchanges in 1949 was about $34,000 (Abst. 483). The plaintiff, under this new act, would not only be required to pay nearly that much in annual regulatory fees (at least $15,000 today) but would also bear the exorbitant additional cost of some 1,500 hearings on license applications, plus bonding premiums and the cost of hiring extensive additional personnel to comply with the armed guard and other provisions of the Act.

V. THE LEGISLATIVE "FINDINGS" UPON WHICH THIS AMENDMENT IS BASED ARE WITHOUT BASIS IN FACT AND HAVE NOT THE REMOTEST RELATION TO ANY PROPER PUBLIC PURPOSE.

(a) Plaintiff's Competition Is Neither Unfair Nor Ruinous.

The trial court found:

> "9. The plaintiff by its operation has not appropriated the most profitable function of the community currency exchange business considered as a whole, but

on the contrary, plaintiff's business has not materially or in any degree affected the profitable operations of the business as a whole or in part.

"10. There has been no unfair or ruinous competition to the licensed community exchange business, and during the years of the plaintiff's operations the community currency exchange business has from year to year increased in size. Neither the industry nor any individual exchange has been rendered unprofitable as a result of the plaintiff's operations." (Jurisdictional statement p. 3A.)

These findings are fully supported by the record. A full briefing and argument would show that there is no substance whatsoever to the claim of hardship by the intervening operators or that plaintiff has any competitive advantage over them.

The economic premise of the legislature in enacting this statute was that intervenors suffer a tremendous competitive disadvantage by reason of their being regulated, while plaintiff is not, and that fairness demands that equal regulatory burdens be imposed on plaintiff without regard to the nonfiduciary nature of his business.

The simple answer to this contention was stated by the dissenting justices:

"The validity of the Community Currency Exchange Act as applied to community exchanges was based on various fiduciary activities in which the plaintiff does not engage, such as handling other people's money, issuing drafts, selling money orders, acting as bailie in payments of bills, taking other people's money and purchasing paper. (*McDougall* v. *Lueder*, 389 Ill. 141.) While extensive regulations of such activities may be warranted, the same regulation of the plaintiff, which merely cashes checks with its own funds, without any fiduciary relationship with the public, is clearly unreasonable. Cf. *People ex rel. Barrett* v. *Thillens*, 400 Ill. 224." (Jurisdictional Statement p. 39a.)

The Attorney General's Motion (pp. 6-7) tries to justify the attempted restraint of competition in this statute on the ground that since the currency exchange owners hold the public's money as fiduciaries in their money order business, they are performing a public service for which plaintiff ought to subsidize them in the check cashing field.

The Attorney General admits, however, that check cashing does not involve holding the public's money. In fact, the currency exchanges obtain a tremendous competitive advantage over plaintiff by reason of the fact that the half billion money orders which they issue each year give them a tremendous "float" of money, which they use to finance their check cashing operations (Abst, 466-468). But plaintiff, who issues no money orders and competes only in the non-fiduciary check cashing field, must make a loan each week of over 3 million dollars (1954 Abst. 163) to finance his operations.

Now intervenor defendants seek to demonstrate that the trial court's findings were without basis in fact, referring to the disproved "findings" of the legislature and complaining of the expenses which each community exchange must bear. That said expenses are present, plaintiff concedes, but plaintiff is in no way responsible therefor and secures no competitive advantage as a result therefrom. If intervenor defendants find such charges burdensome, their complaints should be addressed in a proper manner to the legislature. It does not lie in plaintiff's power to correct the situation, nor does it lessen defendants' expenses by imposing upon plaintiff an illegal and unconstitutional burden.

None of the briefs filed in any of the courts herein have ever suggested a reason why the nonfiduciary plaintiff should bear a part of the expenses of the defendant's fiduciary operations. The statute avoids the problem by inventing the terms "ambulatory currency exchange" and

"community currency exchange." These words have no generic meaning. In no other state is there a statute regulating "ambulatory currency exchanges" or even recognizing that there is such a thing.

Much has been said by defendants about the respective rights of the plaintiff and the currency exchange operators. Nowhere has there been any discussion of the rights of the public. Each week over 100,000 working people (1958) freely elect to use plaintiff's convenient, inexpensive service at their plants. The statute seeks to restrict their right to make this choice. Although the legislature has wholly ignored this right, this Court ought not to follow suit.

(b) Plaintiff's Business Is Neither Dangerous Nor Hazardous.

The remaining ground urged by intervenors to support this legislation is the legislative finding that the plaintiff's activities constitute a hazard to public safety. This argument was seized upon by the Court below to avoid discussion of the infirmities of the Act. (Jurisdictional Statement, page 32a).

There is much quibbling in Intervenors' Motion (pp. 8-15) about the evidence concerning public safety; the trial court however, made the following findings which are fully supported by the record:

> "4. In 17 years of operation no customer of plaintiff or its predecessor has been injured or damaged as a result of a holdup, albeit there have been holdups, in one or two of which an employee of plaintiff was injured. During the same period of time there have been intermittent holdups of the community currency exchanges."
>
> "17. No person has ever suffered any loss as a result of any holdup of the plaintiff's employees."

"19. There is nothing in the provision for an armed guard to benefit the public. On the contrary, the presence of such a guard may insure the exchange of gunfire and the possibility of injury therefrom." (Jurisdictional Statement, pp. 2a, 3a, 4a).

The dissenting justices commented on this evidence as follows:

"The court grounded its opinion solely on the legislative determination that the operations of the plaintiff are dangerous to public safety. The record, in my opinion, reveals something quite different; it conclusively discloses that in seventeen years of operation, the general public has suffered neither physical injury, nor economic harm. But even assuming that the activity of plaintiff in using its own money to cash payroll checks is hazardous *per se*, a conclusion I believe unreasonable, the supervision of the Auditor of Public Accounts, the plethora of fees and charges, and the burdensome requirements of supervision, bonds, records and reports have no conceivable relation to this hazard. Nor does the requirement of an armed guard, without heed to whether plaintiff is cashing checks for $100 or $100,000, have such relation." (Jurisdictional Statement Page 38a).

Even if the evidence afforded some basis for the legislative finding, of hazard to the public, it affords no basis for the various economic provisions, whose sole design is to restrain competition in the check cashing field, and to injure plaintiff's business.

What conceivable relationship can there be between the legislature's proper interest in public safety and the monopolistic licensing provisions, the multitude of confiscatory fees, and the provisions for supervision by the state's chief fiscal officer?

Moreover, even the provisions which appear to have some relationship to public safety are unconstitutional by reason of the discriminatory exemptions and applications and cannot stand in any event.

VI. THE CURRENCY EXCHANGE ACT OF 1943 AS AMENDED IN 1951 IS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

By reason of the exemptions contained in Section 1 this case is on all fours with *Morey* v. *Doud*, 354 U. S. 457.

Plaintiff does not deny that there may be some difference in the method of operation of plaintiff and the other operators of armored express companies, such as Brinks, but asserts that they are not of such a character as to justify any discrimination. The testimony of Eugene Murphy, a Vice President of Brinks, (Abst. 130-145) showed that Brinks engaged primarily in the two types of transactions covered by the exemption, namely, transporting and distributing cash payrolls, and cashing paychecks pursuant to a written contract with the employer, with his money. On occasion, Brinks has used its own money, as Thillens does. A full review of the testimony shows only a paper difference between the transactions involved and no difference in the physical operations or in the risk of physical harm. A full briefing and argument would show that the attempted distinction is even more tenuous than that rejected by this Court in *Morey* v. *Doud*, 354 U. S. 457.

As pointed out by Mr. Chief Justice Hughes in *Smith* v. *Cahoon*, 283 U. S. 553, 567: If "a classification is not based on anything having relation to the purpose for which it is made," the legislation containing said classification is void and unenforceable.

Defendant's final attempt to distinguish *Morey* v. *Doud*, 354 U. S. 457 is to say that it applies only when the exemption is by name. (Attorney General's Brief, p. 8). The simple answer to this contention is that the cases relied upon by this Court in *Morey* v. *Doud*, 354 U. S. 457 did not all involve exemptions by name. See e.g. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79 (cited by this

Court in the *Morey* case at p. 467). Nor is it true, as defendants seem to suggest, that a closed class must consist of but one person or company. See *Morey* v. *Doud*, 354 U. S. 457, 467 n. 12.

The *Morey* decision was based on two earlier decisions, *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; and *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, which presented the converse situation, in which the closed class alone was subject to the provisions of the Act. If the exemption in Section 1 alone is considered, the 1951 Amendment is like the *Morey* case, in that Section 1 creates a closed class of persons *exempt* from the Act. If the whole Act is considered, however, the case is really like *Cotting* and *McFarland*, in that by the blanket exemptions in Section 1 of the other check cashers and by the specific discriminations in favor of the "community" exchanges in the other sections of the Act, the legislature has really created a closed class of persons who are *subject* to the Act. And the primary, if not the sole, member of that class is plaintiff.

The legislation here in question denies to plaintiff the equal protection of the laws guaranteed by the Federal Constitution.

VII. THE SUPREME COURT OF ILLINOIS TRIED TO REVERSE THE HOLDING OF THIS COURT IN MOREY v. DOUD ON THE QUESTION OF THE INVALIDITY OF THE ACT.

This Court, in *Morey* v. *Doud*, 354 U. S. 457, after finding that the exemption of the American Express Company was unconsfitutional, turned to the question of whether the exemption was severable. On the authority of *McDougal* v. *Lueder*, 389 Ill. 141, this court held that the exemption was not severable. Accordingly, this Court held the entire act unconstitutional in its entirety. (354 U. S. 457, 649-70.)

The plaintiff moved to dismiss the appeal in the Supreme Court of Illinois on the ground that the subject matter of the suit had been disposed of by this Court since the entire act had been declared to be a nullity.

While the motion was pending the legislature purported to amend the statute by eliminating the exemption. (H. B. 1031, Jurisdictional Statement, pp. 40a, 41a, and 42a).

Plaintiff then filed a brief raising the question of whether the legislature had power to amend a statute, which had been declared unconstitutional. The Court refused to pass on the question of the effect of the amendment. (Jurisdictional Statement, p. 36a). (Parenthetically, it may be noted that neither of the cases cited by the Attorney General (p. 9), *Abbate Bros* v. *City of Chicago*, 11 Ill. 2d 337 or *Albers* v. *Lamson*, 380 Ill. 35, reach the question of whether an act which has been *declared* unconstitutional may subsequently be revived by mere amendment.)

What the Supreme Court of Illinois did was to say that this Court erred in holding the exemption severable, because the Supreme Court of Illinois then believed its earlier case, *McDougal* v. *Lueder*, 389 Ill. 141 had been wrongly decided. We have no dispute with the proposition that severability is a question of state law, and that state law should be followed if the question has already been litigated in the state courts. However, we submit that once the question has been decided by this Court, it is not open to review by the lower state court. Redress in the event of an unfavorable decision by this Court, whether correct or not, must come from the legislature. When this Court declared the Currency Exchange Act to be a nullity, the legislation was dead. It could be reenacted by the legislature without the exemption, but this Court's decision holding it invalid was not subject to review by a lower court, the Supreme Court of Illinois.

VIII. THE LEGISLATION IN QUESTION FOCUSES ATTENTION ON ONE OF THE GROWING PROBLEMS OF OUR AGE: THE POWER OF A GROUP OF BUSINESSMEN AND A RESPONSIVE LEGISLATURE TO DESTROY OR SERIOUSLY INJURE THE BUSINESS OF ONE CITIZEN FOR THE PURPOSE OF AIDING HIS COMPETITORS.

With the development of powerful trade associations, legislation of this character may well be a more serious danger to free competition and the valuable property rights of citizens than the more traditional methods of unfair competition. The development of powerful private groups which between them exercise a multitude of power ordinarily thought of as governmental in character has been of such broad sweep in the last decade, as to cause one serious commentator to state that the development "casts serious doubt upon the practical validity of some of the most basic theoretical assumptions concerning governments' monopoly of ultimate authority."[1]

Whether or not the developments referred to justify the commentator's extreme fears concerning the threat to the ultimate sovereignty of government, they do suggest the increasing necessity for constant vigilance by the courts to assure to citizens adequate protection from arbitrary, capricious or discriminatory legislation. The powers of the legislature have always been broad, but they have never included the right to enact statutes which are arbitrary, capricious or discriminatory.

Plaintiff has devoted a lifetime to developing an extremely valuable business, which provides over 100,000

1. W. W. Wirtz, *Government by Private Groups*, 13 La. Law Rev. 440, 463. At page 462 the author details certain workings of the lobbyists in the 1951 session of the Illinois legislature. For an interesting account of how the "agreed bill" system, under which four trade organizations have exercised a veto over bills related to industrial relations, has operated in the Illinois legislature, see Steiner, *Legislation by Collective Bargaining* (1951).

working people in Illinois with a convenient, inexpensive means of cashing their weekly paychecks. By a closely-divided court below (4-2, with Mr. Justice Schaefer not participating) a statute has been sustained which has no other purpose than to destroy a business which has previously been described by the Supreme Court of Illinois, as: "Highly useful and desirable." *People* v. *Thillens*, 400 Ill. 224, 234.

For thirteen years plaintiff has had to fight a continuous barrage of legal and legislative maneuvers by intervenors, which have had the destruction of his business as their sole end. Unless relief is granted by this highest Court Thillens will be without effective remedy and intervenor-defendants will have succeeded in destroying a valuable property right, which has been created by a lifetime of work, and which is entitled to constitutional protection.

CONCLUSION.

1. The exemption contained in Section 1 of the Act results in a denial of equal protection of the type and character condemned in *Morey* v. *Doud*, 354 U. S. 457.

2. The imposition of a multitude of arbitrary, capricious and discriminatory licensing and regulatory provisions on plaintiff for the benefit of his competitors, coupled with the simultaneous exemption of other firms engaged in the same business as plaintiff, renders the statute discriminatory and unconstitutional under the principles announced by this Court in *Morey* v. *Doud*, 354 U. S. 457.

3. The Supreme Court of Illinois attempted to reverse the holding of this Court in *Morey* v. *Doud*, 354 U. S. 457, that the unconstitutional exemption of the American Express Company from the operation of this Act was not severable from the remainder of the Act, and that hence the entire Act was unconstitutional.

4. The Act in question deprives plaintiff of its valuable property without due process of law and is in violation of the equal protection clause of The Fourteenth Amendment of the Federal Constitution.

It is submitted that this appeal presents substantial federal questions (*Staub* v. *Baxley*, No. 48, October Term, Supreme Court of United States); that it is meritorious in that the opinion below is in conflict with decisions of this Court; that the motions should be denied and that the case should have plenary consideration.

Respectfully submitted,

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